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ABSTRACT

The first textbook censorship challenge reached the courts in 1949, when a group of Jewish parents objected to Jewish stereotypes in literature used in the classrooms. This New York case is a reminder that (1) would-be censors do not always come from the far right; (2) while most censorship cases go to court for the purpose of having controversial materials put back on the shelves, sometimes a community or parent group will come to court from the opposite direction--to have material removed; and (3) library and textbook censorship issues are basically different from most other issues that arise under Constitutional free speech. In 1982, the United States Supreme Court finally intervened in a censorship case in Long Island, New York, where students had objected to the school board's decision to remove or restrict several library books found objectionable by parents and by the board. The case was significant in its opinion in favor of a plurality of educational materials, and in its singular recognition of the role of the school library in the educational process. The case was also disappointing in its elusive standard of proof, and in defining what was being supressed--ideas or vulgar language. The Supreme Court probably raised or left open many more questions than it answered in this decision, presenting two contrasting approaches to library and curriculum acquisitions: removing those materials that are injurious to a historically disadvantaged segment of society, or taking an ideologically neutral position on such materials. All materials not legally obscene or otherwise beyond First Amendment protection would be entitled to equal consideration. This approach seems preferable to a double-standard of acquisition. (HTH)

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Some New Perspectives on the First Amendment in the Schools
Wisconsin Intellectual Freedom Coalition
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Robert M. O'Neil

By this point in the program I suspect you have heard more about George Orwell's view of our time than you may have expected -- and would surely not welcome any further speculation on my part. Suffice it to say that a quick rereading of 1984 was not altogether reassuring -- though it does seem that we have somehow managed to avoid the worst of Orwellian excesses.

My starting point is not so much the book or the author but rather the year in which the latter gave literary birth to the former. Orwell's work was first published in 1949. By curious coincidence, that was also the year when school textbook challenges first reached the courts. The earliest case has, in fact, a strikingly modern quality.

A group of Jewish parents in New York City went to court because they objected to the use in English classrooms of Shakespeare's Merchant of Venice and Dickens' Oliver Twist. Both works, they argued, contained anti-Semitic stereotypes and thus demeaned the Jewish community for reasons unrelated to current values. A trial judge took considerable testimony and thought hard about this claim. In the end, however, he dismissed the suit because he was convinced that New York school officials -- especially those responsible for the English curriculum -- took great pains to avoid anti-Semitic stereotyping. Teachers were supposed to point out to students that Shakespeare's Shylock and

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Dickens' Fagan were only caricatures and bore no valid resemblance to Jewish merchants of the Twentieth Century. Thus in the very year in which Orwell's 1984 first appeared, the courts declined to tell English teachers what they should and should not include in their curricula.

The New York case has several significant -- indeed prophetic -- features. For one, it reminds us that would-be censors don't always come from the far right; there are times when pressures also arise from more congenial quarters. That theme has recently been repeated in several instances in which Black parents have sought to restrict the use or the circulation of Huckleberry Finn, and women's groups have opposed the assignment or even circulation of materials they believed to be sexist or demeaning. The case of the New York Jewish parents was thus highly significant if only because it marked the first of what have increasingly become potential threats from non-conservative interest groups.

Second, this case also reminds us that people do not go to court only to have controversial materials put back in the curriculum or on the library shelves. While most of the censorship cases are of that type, every so often a community or parent group will come to court from the opposite direction -- seeking to have material removed rather than restored. Some years later, for example, a parent group in Michigan went to court seeking to have certain works of Kurt Vonnegut removed from the curricula on the curious ground that their use violated the religious freedom clauses of the Constitution. Here, as in the earlier New York case, the court wisely declined to intervene.

Third, the case of the Jewish parents early raised a question that has continued to be troublesome. Library and textbook censorship issues are basically different from most other issues that arise under the free speech and free press clauses of our Constitution. The whole thrust of our First Amendment, in fact, has been to get government out of the business of judging the content of protected speech. Clearly, for example, that amendment forbids public officers and bodies from imposing subjective or personal literary standards on the content of libraries or school curricula. Yet the acquisition of books for school libraries and classrooms involves precisely such a judgment on the part of a government employee. Controversial books would not appear in the library or the curriculum at all if a librarian, teacher, textbook commission, or curriculum supervisor, had not found the contents worthy of a place on the shelves or in the classoom. We thus encounter a curious paradox: if the courts are to recognize constitutional interests on the part of librarians, teachers, and others affected by censorship, they must somehow explain why one government official's content judgments about books are to be protected from another government official's interference. This is something the courts have never really done and are not likely to do.

If 1949 is the starting point not only for Orwell's dismal prognosis but also for school textbook and library litigation, the early development of this branch of the law was rather slow. The next case came in the mid-1960s -- and by another curious coincidence, involved Huxley's Brave New World. This case came up

in more familiar way. A teacher in Baltimore had been suspended for insisting on including Brave New World in his course over the objections of school administrators. He went to court to get his job back on the ground that his constitutional rights had been abridged by his suspension. The court might have been sympathetic but could not grant relief for essentially technical reasons; the case came to rest with the teacher out of a job and the book out of the Baltimore curriculum.

Little more happened until the early 1970s. The last dozen years have seen virtually all the cases on library and curricular censorship. The lower federal courts have split rather sharply -- some finding that students, parents, and teachers do have constitutional protection against censorship while others have that school boards and administrators must have broad powers over both library acquisition and classroom curriculum.

The situation was in disarray until two years ago when the United States Supreme Court finally entered the scene. The case which the high court took up came from a school district on Long Island. The facts are relatively familiar. A group of parents objected to certain books in the school libraries. The school board first responded by ordering the books to be taken out of the libraries and put in the central office pending board review. It justified this action by labeling the books "anti-American, anti-Christian, anti-Semitic, and just plain filthy." An explanatory press release cited the board's duty "to protect the children in our schools from this moral danger as surely as from physical and medical dangers." The Board then appointed a

parent-teacher review committee to read the books and recommend further action. The committee was supposed to consider such factors as "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level." Several months later the review committee proposed that five of the challenged books should be retained and two others permanently removed from the libraries. The committee could not agree on the other four books, but the school board rejected the committee's report and allowed only one book to be returned to the library shelves without restriction. One other was to be available only with parental approval and the rest were to be removed both from libraries and from the curriculum. The board gave no reasons whatever for rejecting the committee's recommendations.

At this point a group of students went to federal court challenging the board's action as a violation of their rights of free speech. A district judge dismissed the complaint. The court of appeals, however, felt the students should at least have their day in court. At this point, before the case was tried, the Supreme Court agreed to review the whole issue.

The Supreme Court's decision is unfortunately not a model of clarity. Justice Brennan announced what the Court had decided but spoke only for two others of his colleagues. They agreed with the Court of Appeals that the students were indeed entitled to their day in the trial court. One other Justice agreed on a narrower ground and the fifth vote necessary for that result joined them on some very technical and procedural reasons. Four Justices dissented and each wrote a separate opinion.

The central view of the case is found in Justice Brennan's opinion for a plurality. That opinion can be summarized rather quickly. It began by recognizing that school boards have very broad discretion not only to make general policy but also to see that values are inculcated through the curriculum. The case before them did not question that authority. Nor did it involve in any way the acquisition of library books but only their removal. Public school students did, however, have important First Amendment rights -- not only to speak out in class and elsewhere but also to receive information through the educational process. The school library was an especially vital part of that process. Any restrictions on the circulation of school library books must, therefore, be consistent with the free speech clause of the First Amendment. The federal constitution said the Court would not allow a school board to remove books from the library because the board found certain ideas in them to be objectionable to board members or to the community. If, however, book removal were based solely on board judgments about such factors as "educational suitability," then they might be removed.

The critical question in the case was whether the evidence showed there had been a "purposeful suppression" of a particular point of view that was offensive to the school board. It was true that students had not been completely cut off from reading these books -- since they were available in public libraries and bookstores elsewhere in the community. But the Court had earlier held that alternative sources did not insulate otherwise suspect censorship and now applied that principle to this case. Of course,

the Justices did not make a final decision that "purposeful suppression" had actually occurred. All they said was that such suppression might be shown if the students had a chance to present their evidence. It was on this basis that the Supreme Court sent the case back for a full trial on the student constitutional claim.

The other major value of the decision was its singular recognition of the role of school libraries in the educational process. In this respect the case was clearly one of first impression. A Supreme Court decision in the mid-1960s had arisen in a public library -- but dealt with racial segregation rather than with acquisition or circulation policies. Justice Brennan now wrote of the role of the library as follows: "The school library is the principal locus of [intellectual] freedom. . . . It appears from the record that use of the Island Trees' school libraries is completely voluntary on the part of students. Their selection of books from these libraries is entirely a matter of free choice; the libraries afford them an opportunity at self education and individual enrichment that is wholly optional." Thus, for the first time, three (and possibly four) Supreme Court Justices went on record as recognizing unmistakably the contribution of the school library to the whole educational process.

If encouraging in these respects, the decision was also disappointing in several others. For one, there was a quite elusive standard of proof -- evidence of "intent," "motive," or "purpose," which must be present to establish unconstitutional censorship. Demonstrating such animus would always be difficult -- the more so in cases like this one where no reasons were stated

beyond the initial press release and one would thus need to infer a tainted motive or improper purpose from the actions taken rather than from the reasons given.

A second problem is defining what must be "suppressed" to find unconstitutional action. Justice Brennan assumed that the case involved "official suppression of ideas." In fact, it is far from clear that the objection was truly ideological. It may well have been taboo words and vulgar phrases rather than "ideas" that offended the parents and troubled the school board. While objections aimed at dirty words may in part be political, racial, social, or religious, it is equally possible that the objectors simply believed such language has no place in the school room or the library. Regrettably, the Court did not really address the relationship between word-based and thought-based objections to modern literature.

The problem is further compounded by an admission which the students' lawyer made during oral argument. Specifically, they "implicitly concede that an unconstitutional motivation would not be demonstrated if it were shown that [the school board] had decided to remove the books at issue because those books were pervasively vulgar." The Court drew from that concession a distinction between objections to "ideas" and objections to "pervasive vulgarity" -- as though these two literary perspectives were wholly distinct and separable. Then, to add further confusion, there was another concession that removal based solely upon the "educational suitability" of the books would be constitutionally invulnerable. Here, too, a dangerous if not false

dichotomy emerges -- between "suppression of ideas" on the one hand and preserving "educational suitability" on the other. Henceforth, school boards or administrators with any knowledge of law and a desire to avoid lawsuits may justify removal of books on grounds of either "educational suitability" or "pervasive vulgarity" and insist that "suppression of ideas" could not have been further from their minds. Whether these distinctions can be probed more sharply in future cases remains to be seen.

The two standards themselves pose potentially serious interpretive problems. Let us explore them each separately for a moment. "Educational suitability" is dangerously broad and imprecise. In fact, it is hard to imagine a situation in which a school board could invoke "educational suitability" as the basis for removing a book which a professional librarian had bought and shelved precisely because of its apparent "educational suitability." While in certain matters -- broad contours of the curriculum, for example -- the board surely has power to overturn the judgment of librarians, teachers, and administrators on "educational suitability," it is difficult to extend that power down to the circulation of a particular book. Thus the criterion itself is not only imprecise but difficult to envision in practical application.

Questions may now arise about some important lower court decisions. Take, for example, a recent judgment of the Federal Eighth Circuit on a matter of curricular content. A film version of "The Lottery" had been included in a Minnesota high school unit. Following citizen objections, the school board voted to

remove the film and other materials. The District Court and the Court of Appeals both held that removal based upon objectionable themes violated the students' First Amendment rights. The court concluded: "What is at stake is the right to receive information and to be exposed to controversial ideas -- a fundamental First Amendment right. If these films can be banned by those opposed to their ideological theme, then a precedent is set for the removal of any such work." This decision suggests the extent to which courts have applied to curricular censorship principles derived from the library cases.

There are, of course, curricular issues of a quite different sort. If, for example, a school board decides to alter or even cancel an entire course for reasons which may well reflect political, social, or ideological bias, such decisions would seem beyond judicial review. Recourse in major curricular matters ought to be political rather than judicial; parents who believe that a controversial course was improperly cancelled or truncated should seek redress at the ballot box rather than in the federal court. The limits of judicial competence in curricular matters should be particular course materials -- e.g., the film in "The Lottery" case -- rather than entire units or courses. In between, there entitled to First Amendment protection on grounds analogous to protection for the practice of other learned and intellectual professions. The plurality was thus correct in sensing the need to draw some distinction at that point; it ought not, however, to have drawn a line which precludes all non-acquisition challenges.

The point, I hope, now becomes clear: the Supreme Court probably raised or left open a good many more questions than it answered in its 1982 decision. Nonetheless, we do have more guidance than we had five or even three years ago. Yet ironically this recent case really would not add much to the case with which I began -- the suit brought by New York Jewish parents protesting the use of Merchant of Venice and Oliver Twist in English classes. Nor would it give much guidance to Black parents who object to the use of Huckleberry Finn because of the character of Nigger Jim. Nor would it answer the growing concerns of women's groups who object to what they view as sexist or demeaning materials in libraries, classrooms -- or for that matter on newsstands and in bookstores. Increasingly concerns of this sort have taken their place along with the more familiar censorship pressures from traditionally conservative groups. Several school boards -- in communities as diverse as New Trier, north of Chicago; Oakland, California; Albuquerque, New Mexico; and Fairfax County, Virginia; have acceded to such pressures and have withdrawn or restricted access to allegedly racist and/or sexist material. Yet no court has directly decided this issue. There is accordingly no binding judgment on the status of allegedly racist, sexist, or ethnically demeaning speech and its status in the library or in the classroom.

There are two contrasting approaches which at least deserve attention -- and the statement of which simply poses our dilemma. On the one hand a court might say that if a work is so clearly offensive to a historically disadvantaged segment of society that its acquisition and circulation would compound the injury to that

group then a librarian might reasonably exercise professional judgment not to buy that book -- even though a similar judgment in the case of a Vonnegut or Heller book would not be constitutionally acceptable. Indeed, this position has at times been advanced by the Children's Inter-racial Book Council and other organizations. It is certainly a tenable and emotionally appealing position.

On the other hand, there is great force to an ideologically neutral position which treats Merchant of Venice, Huck Finn, Oliver Twist and others no differently from Slaughterhouse Five, Catch 22, or Catcher in the Rye. Under this approach all materials that are not legally obscene or otherwise beyond First Amendment protection would be entitled to essentially the same consideration. Librarians and curriculum developers could no more protect the sensitivities of Black parents in Chicago or Jewish parents in New York than they could protect the sensitivites of religiously or politically conservative parents in Strongsville, Ohio or Minot, North Dakota. My own sympathies fall on this side of the line. While I do appreciate the dilemma which a conscientious librarian faces -- especially the minority librarian serving a minority community -- I am more troubled by saying that we can have for these purposes a double standard of acquisition, circulation or curriculum.

With the dilemma thus before us -- and only a hint at my own solution of it -- let me conclude since I know members of the Panel will have much to say on this and related subjects. I like to think George Orwell would be immensely relieved that such a Symposium was simply being held at all in 1984 and that we had begun this session with a case decided in 1949.